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No. 06-1606

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In The

Supreme Court of the United States

STEPHEN AVILLA and LEGAL AID SOCIETY OF SANTA CLARA COUNTY,

Petitioners,

v.

JAMES McNAIR THOMPSON,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal For The Sixth District

BRIEF IN OPPOSITION

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QUESTION PRESENTED

A non-governmental, non-profit legal aid corporation contracts with a County to appoint and compensate non-employee lawyers from a panel to represent indigent criminal defendants in cases where a conflict of interest requires separate counsel. The corporation is solely responsible for the review, approval/disapproval, and payment of billings submitted by its appointed attorneys, and operates independently of any state entity in regard thereto. The following question is presented:

> Is the legal aid corporation a "state actor," therefore subjecting it to suit for alleged violation of the lawyer's civil rights under 42 U.S.C. § 1983, when it disapproves an appointed lawyer's bills and deals with a subsequent fee dispute with the lawyer over the disputed bills, because the legal aid corporation performs a traditionally exclusive state function in dealing with such matters?

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JURISDICTION

Petitioners assert that this Court has jurisdiction under 28 U.S.C. §1257(a). It appears that Petitioners' principal claim is that the State Court inappropriately applied well-settled tests for "state-action" within the meaning of 42 U.S.C. §1983, and therefore arrived at an erroneous factual conclusion that petitioners were engaged in state action at the time of their wrongful conduct.

COUNTER STATEMENT OF THE CASE

Respondent "has been practicing law since 1975 and is a bar certified specialist in criminal law. He has extensive experience in both the state and federal system representing defendants accused of murder. Two federal judges had appointed him to represent capital defendants under the federal 'learned counsel' statute." (Pet.App. 47a)

In 1996, Respondent was appointed by the Superior Court of the State of California, County of Santa Clara to represent Robert Lee Mares, who was charged with two counts of capital murder. (Pet.App. 4a) He had also been appointed by the same court to represent Geary German in an unrelated capital case. (Pet.App. 4a) During the pendency of these two cases, in 1997, the County of Santa Clara, which was obligated to pay fees to appointed counsel under California law (Penal Code §987.2), entered into a contract with Petitioner Legal Aid Society of Santa Clara County to administer such payments, and Legal Aid Society of Santa Clara County in turn hired Petitioner Stephen Avilla to be the coordinator of that program. (Pet. 5)

> "Through June 1999, Thompson submitted monthly bills for his work on the *Mares* case, and

> Legal Aid paid them. During that time, Thompson also submitted bills for his work in an unrelated murder-for-hire case called *People v. German*. Legal Aid reduced one of the *German* bills by thousands of dollars, and Thompson protested. He tried to resolve the dispute, but when his efforts failed, he filed a motion challenging the fee reduction. During the proceedings on the motion, Avilla indicated that it would be inappropriate to pay Thompson's bills because Thompson considered the court to be the proper forum for determining a reasonable fee. Ultimately, the court granted Thompson's motion and directed Legal Aid to pay him in the *German* case. Thereafter, from August to December 1999, Legal Aid declined to pay bills totaling $57,586.37 that Thompson submitted in the *Mares* case, which had ended in dismissal without prosecution. At trial, Antonio Estremera, directing attorney for Legal Aid, acknowledged that in his deposition, he testified that Avilla told him he was suspending payments to Thompson in the *Mares* case because of the fee dispute in the *German* case." (Pet.App. 4a-5a)
>
> "When his bills went unpaid, [Respondent] wrote a number of letters to Avilla, seeking and then demanding payment. He got no response and then filed a series of legal motions for payment and then this lawsuit." (Pet.App. 6a)

The trial court awarded Respondent damages as the third-party beneficiary of the contract between Legal Aid Society and the County of Santa Clara for payment of appointed counsel, but held against Respondent on his claim for damages under 42 U.S.C. §1983, which alleged that the Petitioners used their power to pay appointed counsel in the Mares case to retaliate against Respondent

for exercising his right to petition the Court for payment in the German case.(Pet.App. 2a-3a)

The Court of Appeal of the State of California, Sixth Appellate District reversed the trial court on the 42 U.S.C. §1983 cause of action, sending the case back to the trial court for trial thereon. (Pet.App. 29a)

SUMMARY OF ARGUMENT

Petitioners urge this Court to resolve a question which is premised on facts which have nothing to do with this case, and urge this Court to review the unpublished decision of the California Court of Appeal, Sixth Appellate District because Petitioners disagree with the factual determination of whether payment of court appointed counsel in California is a state function under California law. This is not an appropriate use of this Court's resources. (Rules of the Supreme Court of the United States, Rule 10.)

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Purported Question Presented Relies Upon An Incorrect Statement Of The Record Below

Petitioners contend that this case presents the question:

> A non-governmental, non-profit legal aid corporation contracts with a County to appoint and compensate non-employee lawyers from a

> panel to represent indigent criminal defendants in cases where a conflict of interest requires separate counsel. The corporation is solely responsible for the review, approval/disapproval, and payment of billings submitted by its appointed attorneys, and operates independently of any state entity in regard thereto. The following question is presented:
>
> > Is the legal aid corporation a 'state actor," therefore subjecting it to suit for alleged violation of the lawyer's civil rights under 42 U.S.C. § 1983, when it disapproves an appointed lawyer's bills and deals with a subsequent fee dispute with the lawyer over the disputed bills, because the legal aid corporation performs a traditionally exclusive state function in dealing with such matters? (Pet. i)

That question is premised upon the factual assertion that (1) the Petitioners "appoint . . . lawyers from a panel . . . " and (2) the lawyers representing indigent defendants are therefore "*its* [Petitioners'] appointed attorneys."

This would make Petitioners akin to a Public Defender's Office in California, or certain legal aid societies in New York, whereby the office is appointed to represent the defendant, and the office delegates this duty to one of its employees.

That is not the case here. As noted above, Respondent was appointed by the Court in both the German and Mares cases before Respondents had anything to do with administering payment of appointed counsel. Respondent was never "appoint[ed] . . . from a panel" by Petitioners, nor was Respondent ever "[Petitioners'] appointed counsel."

Petitioners struggle to turn a violation of Respondent's fundamental civil rights into a mere employment dispute, but since Respondent was neither employed by, nor in any contractual privity with, Petitioners, this argument is without merit.

It is for this reason that Petitioners' reliance on *Graseck v. Mauceri*, 582 F2d. 203 (2nd Cir. 1978) and *Lefcourt v. Legal Aid*, 445 F.2d 1150 (2d Cir. 1971) is misguided. As Petitioners concede, these two cases "held that legal aid societies, in dealing with their *employees as employees*, were not state actors sufficient to allow suit by an employee-lawyer under §1983." (Pet. 12-13, emphasis added.)

The State Court recognized that those cases are entirely different than the present case, holding "those cases involved managerial decisions concerning the composition of their staffs, which fell within the exclusive purview of the independent societies. Questions about whom an independent entity should hire and fire do not implicate the state's constitutional or statutory obligations. Those decisions are purely internal, employment matters, over which the institutions exercised exclusive, independent, and complete control." (Pet.App. 25a) Footnote 9 to the State Court Opinion further clarified, "The trial court also cited *Blum v. Yaretsky* (1982) 457 U.S. 991. There, the court concluded that decisions by private nursing homes concerning the transfer of Medicaid recipients did not involve state action because those decisions were based on independent medical evaluations, for which the state is not responsible. (*Id.* at p. 1006.) Here, however, the County is obligated to provide reasonable compensation for services rendered by appointed counsel and remains

ultimately responsible to ensure that function is performed." (Pet.App. 25a)

II. The Issue Which Lies At The Heart Of The Question Presented Is A Factual Issue Which Is Resolved By Reference To State Law Properly Decided By The State Courts

Petitioners asserted that they have presented this Court with the question, "Is the legal aid corporation a 'state actor,' therefore subjecting it to suit for alleged violation of the lawyer's civil rights under 42 U.S.C. § 1983, [under certain circumstances] because the legal aid corporation performs a traditionally exclusive state function in dealing with such matters?" (Pet. i)

That is a factual question, which can only be resolved by reference to state law.

The State Court held:

> [T]he Sixth Amendment obligates the state to provide counsel to indigent criminal defendants. (*Gideon v. Wainwright* (1963) 372 U.S. 335, 342-343; *In re Williams* (1969) 1 Cal.3d 168, 174; *People v. Lara* (2001) 86 Cal.App.4th 139, 150 ["absolute duty to appoint counsel to represent an indigent defendant"].) In accordance with that constitutional mandate, Penal Code section 987 establishes procedures for the determination of indigency and appointment of counsel, and Penal Code section 987.2 requires that the state pay appointed counsel for their services. Indeed, in *Cunningham v. Superior Court* (1986) 177 Cal.App.3d 336 (rev. den. May 8, 1986), the court explained that "[i]t is a legitimate state function to assist the poor [citation], but, under the Constitution, this

> goal cannot be accomplished at the expense of one particular group of people. It is a denial of equal protection when the government seeks to charge the cost of operation of a state function, conducted for the benefit of the public, to a particular class of persons." (*Id.* at p. 348.) Thus, the court concluded that requiring a defense attorney to represent indigent defendant without compensation would violate his or her right to equal protection. (*Id.* at pp. 348-352.) Accordingly, we conclude that the appointment and payment of reasonable fees for services rendered by counsel are public functions. (Pet.App. 21a)

After noting that appointment and payment of counsel for indigent criminal defendants was a government function (Pet.App. 22a-23a), the State Court addressed Petitioners' complaint that if payment of appointed counsel is an exclusively state function, it is not a traditional state function.

> We also recognize that to make out a civil rights claim, one must show more than that a private actor is serving a public function. "[T]he question is whether the function performed has been 'traditionally the *exclusive* prerogative of the State.' [Citations.]" (*Rendell-Baker v. Kohn* (1982) 457 U.S. 830, 842, italics in original.)
>
> There are organizations and attorneys who provide – and have long provided – pro bono services for indigent criminal defendants. However, the Sixth Amendment and Penal Code section 987.2 impose exclusive duties on the state to appoint and pay for counsel when an indigent defendant comes to court unrepresented. And paying reasonable compensation when counsel is

> appointed is now the exclusive prerogative of the state.
>
> Legal Aid notes that before 1941, there was no provision for the payment of court-appointed counsel by the state, and appointed counsel often served without pecuniary compensation under their professional duty to defend the defenseless and oppressed. (See *Lascher v. State* (1966) 64 Cal.2d 687, 689.) Given this history, Legal Aid argues that the payment of appointed counsel is not a *traditional* public function. However, if paying appointed counsel reasonable compensation was not a traditional public function before 1941, it is now and has been since the enactment of former section 987a, the predecessor to section 987.2. (See stats. 1941, ch. 451, § 1.) (Pet.App. 23a-24a)

Thus, Petitioners complaint is that error occurred in the State Court consisting of erroneous factual findings or the misapplication of a properly stated rule of law. While Respondent disputes this assertion, even if the State Court did make an erroneous factual finding that payment of court appointed counsel is a traditional state function within the meaning of *West v. Atkins*, 487 U.S. 42 (1987)), or if it misapplied the correctly articulated rule of *West*, this is precisely the sort of issue disfavored in Rules of the Supreme Court of the United States, Rule 10.)

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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